

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 3, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-158
Petitioner	:	A. C. No. 36-08746-26477 LVY
v.	:	
	:	Quecreek No. 1 Mine
PBS COALS, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-152
Petitioner	:	A. C. No. 36-08746-26478 KQN
v.	:	
	:	Quecreek No. 1 Mine
MUSSER ENGINEERING, INC.,	:	
Respondent	:	

## DECISION

These consolidated proceedings were brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (hereinafter the “Mine Act” or “the Act”), following a July 24, 2002 nonfatal entrapment accident at the Quecreek No. 1 Mine, located in Somerset County, Pennsylvania. In a prior ruling on cross motions for summary decision, I concluded that Respondents PBS Coal, Inc. (“PBS”) and Musser Engineering, Inc. (“Musser”) violated 30 C.F.R. § 75.1200<sup>1</sup> as alleged by the Secretary. *Black Wolf Coal Co.*, 28 FMSHRC 699,

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<sup>1</sup> 30 C.F.R. § 75.1200 provides:

The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show:

- (a) The active workings;
- (b) All pillared, worked out, and abandoned areas, except as provided in this section;
- (c) Entries and aircourses with the direction of airflow indicated by arrows;
- (d) Contour lines of all elevations;

709, 716 (July 2006).<sup>2</sup> I further concluded that as to the civil penalties proposed by the Secretary, outstanding questions of material fact precluded a summary decision. *Id.* at 711, 717. There were insufficient uncontroverted stipulations of fact to allow me to determine whether PBS's reliance on a mine map prepared by Consolidation Coal Co. ("Consol") was reasonable, *id.* at 711, and whether Musser knew or had reason to know that its permit map would serve as the basis for the MSHA section 75.1200 map of the Quecreek No. 1 Mine, *id.* at 717.

A hearing on these questions was held from August 28 to August 31, 2007, at the Somerset County Court House in Somerset, Pennsylvania. The parties filed post-hearing briefs, which I have considered in reaching my decision. For the reasons that follow, I conclude that the penalties initially proposed by the Secretary against PBS and Musser would not adequately effectuate "the deterrent purpose underlying the Act's penalty assessment scheme." *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). I reach this decision based on my conclusion that PBS and Musser abjectly failed to meet the level of care required of them under section 75.1200, and that their failure to do so constitutes a very high level of negligence. I also base my decision on the extreme gravity associated with the violations of section 75.1200 committed by PBS and Musser.

In my prior decision, I set forth the procedural background of these proceedings and summarized the relevant uncontroverted facts as set forth in the parties' joint stipulations of fact. 28 FMSHRC at 700-704. For purposes of this decision, I hereby incorporate by reference my prior findings. Further findings of fact based upon evidence adduced at trial are set forth below.

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- (e) Elevations of all main and cross or side entries;
  - (f) Dip of the coalbed;
  - (g) Escapeways;
  - (h) Adjacent mine workings within 1,000 feet;
  - (i) Mines above or below;
  - (j) Water pools above; and
  - (k) Either producing or abandoned oil and gas wells located within 500 feet of such mine and any underground area of such mine; and,
  - (l) Such other information as the Secretary may require. Such map shall identify those areas of the mine which have been pillared, worked out, or abandoned, which are inaccessible or cannot be entered safely and on which no information is available.

<sup>2</sup> Black Wolf Coal Company, Inc. ("Black Wolf") originally was a party to these proceedings (PENN 2004-157), but following my ruling Black Wolf separately entered into a settlement agreement with the Secretary. I have approved the settlement in an order being issued concurrently with this decision.

## **Findings of Fact**

1. Musser was aware that the map prepared for the Quecreek No. 1 Mine permit had to show among other things an outline of abandoned mines adjacent to the proposed mine being permitted. Tr. 150 (testimony of Edwin Secor, former Musser supervising engineer).
2. After Musser requested Consol to provide it with any maps of the Harrison No. 2 Mine (*see* Stip. 65), Consol provided a map to Musser that was later determined to be inaccurate because it showed reserves that had already been mined. Tr. 44-45.
3. Musser and PBS subsequently obtained another map from Consol (Stip. 65) that was not dated, marked final, or certified by a professional engineer or surveyor. Gov't Ex. 3 (hereinafter "Consol Map 2").
4. Musser used the Consol Map 2 as the basis for delineating the boundary of the Harrison No. 2 Mine. Tr. 59, 577, 192-93.
5. Musser's delineation of the boundary of the Harrison No. 2 Mine in turn defined the extent of mining in the Quecreek No. 1 Mine, the limit of which was a 200-foot barrier between development in the Quecreek No. 1 Mine and what was believed to be the furthest extent of the Harrison No. 2 Mine. Stip. 66.
6. PBS was aware that Musser used the Consol Map 2 in delineating the boundary of the Harrison No. 2 Mine, and raised no objections. Tr. 43, 58-59, 106-07, 192-93.
7. The Quecreek No. 1 Mine map Musser prepared that was based on the Consol Map 2 was certified by Edwin Secor, a Musser supervising engineer, and submitted on behalf of Quecreek Mining Company ("Quecreek") to the Commonwealth of Pennsylvania Department of Environmental Protection as part of the initial permit package for the Quecreek No. 1 Mine. Tr. 91-92, 107-08, 137-38, 143-45; Gov't Ex. 5.
8. Musser and PBS knew that it was standard practice for an environmental permit map such as the one Musser prepared and submitted on behalf of Quecreek to be used as the base map from which a mine map required by MSHA would be drawn. Tr. 32-33, 59-60, 335-36, 575.
9. The location of adjacent mines does not change once they are plotted on a permit map, but are simply transferred over to the mine map required by MSHA. Tr. 33, 196, 336.
10. PBS prepared all of the maps of the Quecreek No. 1 Mine by transferring the boundary of the Harrison No. 2 Mine as delineated on the permit map prepared by Musser. Tr. 198, 203-04.
11. PBS prepared and provided mine maps to Black Wolf, the production operator of the mine, based on the environmental permit map that showed the incorrect boundary of the Harrison

No. 2 Mine. Tr. 271-3.

12. If Black Wolf "had known that the boundary line of the [Harrison No. 2 Mine] had been established by the use of an uncertified undated property map of Consol, . . . [Black Wolf] would have done something different. . . ." Tr. 279-80 (testimony of David Rebuck, president of Black Wolf Coal Company).

13. Mine maps commonly depict uncertainty over the extent of workings through the use of dashed or dotted lines, Tr. 522-36, 569, Gov't Exs. 10-13, and both Musser and PBS were aware of this mine mapping convention, Tr. 203, 598-99.

### **Discussion**

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(I) (brackets added).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the [six] statutory penalty criteria must be made" by its judges. *Sellersburg*, 5 FMSHRC at 292. Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000) ("Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act"). In exercising this discretion, the Commission has recently reiterated that in determining the amount of a penalty, a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008) (citing *Sellersburg*, 5 FMSHRC at 291). The Commission also emphasized that when a judge's penalty determinations "substantially diverge from those originally proposed, it behooves [the judge] to provide a sufficient explanation of the bases underlying the penalties assessed by the [judge]." *Id.* The Commission warned in *Sellersburg* that without an explanation for such a divergence,

“the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” 5 FMSHRC at 293.

Here, there is no dispute as to the facts relating to several of the statutory penalty criteria. Both of the Respondents and the Secretary have stipulated as to both PBS and Musser that (1) the Respondents have no significant history of previous violations, (2) the proposed penalties are appropriate to the size of the Respondents’ businesses, (3) the proposed penalties will not affect the ability of the Respondents to continue in business, and (4) the Respondents abated the violations at issue in good faith. Trial Stip. 1; Gov’t Exs. 1-2. I accept the stipulations made by the parties and as to the four criteria, I find that PBS and Musser are both small operators with negligible histories of previous violations, that any penalty imposed under the Mine Act will not affect the ability of either PBS or Musser to continue in business, and that PBS and Musser abated the violations in good faith. There remain two criteria on which I must make findings of fact - - the degree to which PBS and Musser acted negligently in violating section 75.1200, and the gravity of their violations.

### **Gravity**

In a 1996 *Consolidation Coal Co.* decision, the Commission stated: “The gravity penalty criterion under section 110(I) of the Mine Act . . . is often viewed in terms of the seriousness of the violation. . . . The focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on *the effect of the hazard if it occurs.*” 18 FMSHRC 1541, 1549-50 (Sept. 1996) (emphasis added) (affirming judge’s finding that a violation was “serious” based upon evidence of what *could have occurred* given the conditions present).

On July 24, 2002, eighteen miners were working underground in the Quecreek Mine. As a consequence of an inaccurate map, the wet conditions at the No. 6 entry were not perceived as a warning of impending disaster. At approximately 8:45 p.m., water broke through the working face of the No. 6 entry of the Quecreek No. 1 Mine, and nine miners were trapped underground by the resulting inundation. Stip. 29. Nine other miners narrowly escaped a similar fate. The effect of the hazard in this instance was both potentially and actually no less than catastrophic for these miners. Seventy two million gallons of water rushed into the mine. Tr. 391, 397. As a result of the flooding all miners underground faced the possibilities of grievous bodily injury from the force of the water entering the mine, blocked escapeways, severely compromised ventilation, and hypothermia. Tr. 397. In addition, those trapped underground faced and prepared for the ultimate consequence, death. They tied themselves together so that they would be found as a group after the flood waters rose, and they wrote notes to their loved ones and placed them in a waterproof container. Tr. 395-97. These miners surely would have died but for a rescue that was nothing short of miraculous. See Sec’y Br. at 10 (the miners “miraculously

escaped being seriously or fatally injured”).<sup>3</sup> The fact that the nine miners were rescued, however, in no way diminishes the seriousness of the violation that led to their predicament.

Accordingly, I find that the violations of section 75.1200 committed by PBS and Musser were of the utmost gravity.

### **Negligence**

The Mine Act states unequivocally that “the first priority and concern of all in the coal . . . mining industry *must* be the health and safety of its most precious resource – *the miner*.” 30 U.S.C. § 801(a) (*emphasis added*). Furthermore, mine operators and their contractors have an absolute duty to maintain an accurate mine map, including a duty to show all adjacent mine workings within 1,000 feet. 30 C.F.R. § 75.1200. As I have already determined, the Quecreek mine map was inaccurate on the day of the inundation, and therefore, PBS and Musser violated section 75.1200.

In determining the degree to which PBS and Musser were negligent, I turn for guidance to the Secretary’s regulations, which state:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). Under this same standard, high negligence is found if an “operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* at Table X. The Secretary’s Part 100 regulations do not go beyond high negligence.

In my prior decision, I stated that the facts as stipulated to by the parties were insufficient to determine the key questions of “whether PBS’s reliance on the Consol map was reasonable,” and “whether Musser knew or had reason to believe that its permit map would serve as the basis for the MSHA section 75.1200 map.” 28 FMSHRC at 711, 717. After hearing the evidence and considering the arguments of the parties on these questions, I conclude that PBS and Musser were not merely moderately negligent as suggested by the Secretary, but instead acted in a very

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<sup>3</sup> I take judicial notice that the facts regarding the miners’ ordeal and rescue as set forth by MSHA engineer Stanley Joseph Michalek and counsel for the secretary were reported without contradiction by the local and national media that descended within hours of the inundation on the farm of William and Lori Arnold located 250 feet above the Quecreek No. 1 Mine.

highly negligent manner when they violated section 75.1200.

I begin by noting that according to one commentator, “[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984). I find the record in this matter replete with instances of PBS and Musser failing to act conservatively and to err on the side of safety. To the contrary, the attitude here was one of “[w]e permit as much as we can.” Tr. 57. Another witness testified that “you permitted as much as you can to the 200-foot [limit].” Tr. 67. Contrary to the Secretary’s statement that “it is a sin of omission that forms the basis of [PBS and Musser’s] negligence,” Sec’y Reply Br. at 6, I find that the Respondents committed sins of commission, that they knowingly mapped the Quecreek No. 1 Mine based upon questionable information, knowingly placed their production agenda ahead of caution, and then directed their miners into areas that could tragically turn out to be “undiscovered country, from whose bourn / No traveler returns.” *Hamlet*, Act III, scene 1. We can only be thankful that the nine miners did miraculously return from their would be grave, the Quecreek Mine.

I find that Musser and PBS searched for maps of mines adjacent to the Quecreek No. 1 Mine, in particular the Harrison No. 2 Mine, and in consultation with each other, agreed to base the boundary of the Harrison No. 2 Mine on a map provided to them by Consol. Tr. 43-44, 58-59, 61-62, 106-07, 192-93. The trouble was this was the second map Consol provided – the first Consol map contained outdated information, showing as reserves areas that had in fact been mined. Tr. 45. Nor was this second map upon which Musser and PBS based their actions dated, marked final, or certified by a professional engineer or surveyor. Gov’t Ex. 3. As one witness for the Respondents testified, the second Consol map “was the best we had at the time” despite the fact that they *did not consider it an accurate rendition*. Tr. 57-58 (testimony of Musser engineer David Lucas). When asked whether he considered the second Consol map to be “an accurate rendition” of the boundaries of the Harrison No. 2 Mine, Lucas responded: “No.” *Id.* Lucas went on to acknowledge that he was, in fact, “unsatisfied” with the second Consol map. *Id.* In the face of all good judgment and common sense, Musser and PBS decided to accept the second Consol map as an adequate basis upon which to delineate the boundaries of the Harrison No. 2 Mine. They assumed the map from Consol was accurate because they had asked for “the best map available.” Tr. 105.

Having received two contradictory maps from Consol ought to have put the Respondents on notice that all was not right, an indication that “these guys [Consol] don’t have their system down like they used to.” Tr. 458. Even Musser’s expert witness agreed that getting an unreliable map would raise doubts about other maps obtained from the same source. Tr. 651-52. Moreover, it was common knowledge that final, certified mine maps were a rare commodity in Somerset County, Pennsylvania. Tr. 77, 218. One thing the Respondents knew, however, was that the Harrison No. 2 Mine was full of water and updip from the proposed Quecreek No. 1 Mine. I find that under these circumstances, a reasonably prudent person would have erred on the side of safety and taken additional precautions. The Respondents took no such precautions, choosing instead to

play Russian roulette with the lives of miners. As one MSHA witness stated: a reasonably prudent engineer would “ma[ke] it known that there’s a potential for something out there, even if you didn’t find it,” and that this would serve as “a fair warning for everyone down the road that looks at that map that there could be a problem.” Tr. 431.

Given all this, I find it incomprehensible that Musser and PBS failed to place any type of warning on the section 75.1200 map.<sup>4</sup> Just as unexplored areas of the Earth were often shown on maps as great voids of either lightness or darkness, the boundary between the old Harrison No. 2 Mine and the Quecreek Mine could have been shown as just such undiscovered country. The Secretary introduced into evidence mine maps that used dashed or dotted lines where the extent of workings were unknown. Tr. 522-36, 569; Gov’t Ex. 10-13. Witnesses for the Respondents admitted to having seen maps with such markings, Tr. 203, 598-99, and even acknowledged that uncertain boundaries should be noted on mine maps, Tr. 386, 666-67.

In light of the foregoing discussion, I conclude that Musser and PBS acted in a grossly negligent manner.

### **Significant and Substantial**

In their posthearing briefs, the parties address the issue of whether the violations of section 75.1200 at issue here were significant and substantial (S&S). *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). I find that the violations were indeed significant and substantial.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to “significant and substantial,” i.e., more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In the *Mathies* case, the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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<sup>4</sup> Contrary to Musser’s argument that the company “had all the available information and there was no reason to suspect that the mapping of the Harrison No. 2 boundary was inaccurate,” Musser Br. at 13, I find ample record evidence establishes that Musser was on notice that at best, the boundary to the Harrison No. 2 Mine was uncertain, [Tr. 57-58], and that given this uncertainty, Musser had a higher duty of care to err on the side of caution.



6 FMSHRC at 3-4 (footnote omitted). Although the Commission has also held that an evaluation of the reasonable likelihood of injury should be made assuming continued “normal” mining operations, *see U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985), in this case mining operations ceased due to the enormity of the accident that occurred.

Here, it is self evident that the elements of *Mathies* have been established. In my prior decision, I found that Musser and PBS violated section 75.1200 when they prepared an inaccurate map of the Quecreek No. 1 Mine, then used that map to prepare the maps upon which production mining was based. 28 FMSHRC at 709, 716. I find that these violations contributed to the inundation of the Quecreek No. 1 Mine that occurred on July 24, 2002. Musser knew the risk. PBS knew the risk. Only the 18 miners who entered the Quecreek No. 1 mine on July 24, 2002, were deprived of this knowledge. Indeed, the inundation would not have occurred had maps been prepared that allowed an adequate warning of the lack of certainty regarding the boundaries of the mine that was breached and from which the inundation flowed. As for the final *Mathies* elements, I have already found that the consequences of the inaccurate map placed 18 miners in peril of their lives. Quite compelling evidence was adduced at trial as to the near certainty – but for a miraculous rescue – of the deaths of nine miners trapped underground with no daylight for three long days and four long nights. Tr. 389-98.

Accordingly, I find that the violations of 30 C.F.R. § 75.1200 committed by PBS and Musser were S&S.

### **Penalty Assessments**

At the time of the Quecreek Mine inundation, the maximum penalty for a violation of the Mine Act or the Secretary’s regulations thereunder was \$55,000. 30 C.F.R. § 100.3(a) (2002). In these proceedings, the Secretary’s penalty proposal has been something of a moving target. She initially proposed that the Commission assess penalties of \$5,000 against each Respondent. Sec’y Br. at 31. In her reply brief, however, she states: “Given the seriousness of the violations, it is appropriate for the judge to impose the maximum civil penalties in this case. The Secretary respectfully requests an Order requiring Respondents PBS and Musser to pay civil penalties in the amount of the statutory maximums of \$55,000.” Sec’y Reply Br. at 23-24.

As I have already noted, I am not bound by the Secretary’s penalty proposals but must instead make a de novo determination of an appropriate penalty based on the six statutory criteria specified in section 110(I) of the Mine Act. *Sellersburg*, 5 FMSHRC at 291. In light of my findings that the Respondents exhibited a very high level of negligence, and that the gravity of their violations was also very high, I find that it is appropriate to depart from and increase substantially the Secretary’s original penalty proposal.

Accordingly, having considered the six statutory penalty criteria, and finding significant aggravating factors as to the high negligence of Musser and PBS, as well as to the gravity of their violations, I find that a penalty of \$55,000 is appropriate for each of the Respondents’ violations of 30 C.F.R. § 75.1200.

### **Order**

Consistent with this Decision, **IT IS ORDERED** that PBS Coals, Inc., shall pay a total civil penalty of \$55,000.00 for the violation of section 75.1200 set forth in Citation No. 7322488.

**IT IS FURTHER ORDERED** that Musser Engineering, Inc., shall pay a total civil penalty of \$55,000.00 for the violation of section 75.1200 set forth in Citation No. 7322487.

Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters **ARE DISMISSED**.

Robert J. Lesnick  
Chief Administrative Law Judge

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